Office - Supreme Court, U.
FILED
APR 12 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1448

In the Supreme Court of the United States

OCTOBER TERM, 1984

JOSEPH R. LENNON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

4 pp

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1448

JOSEPH R. LENNON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals erred in rejecting his claim that proof of knowledge or reasonable foreseeability that securities obtained by fraud will be transported in interstate commerce is required for a conviction of interstate transportation of stolen property, in violation of 18 U.S.C. 2314.

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted on eight counts of causing the interstate transportation of checks obtained by fraud, in violation of 18 U.S.C. 2314. He was sentenced to a four-year term of imprisonment on count one and to a consecutive five-year term of probation and a cumulative fine of $70,000 on the remaining counts. On appeal, petitioner contended, inter alia, that the trial court committed various errors in instructing the jury. The court of appeals reversed petitioner's convictions because it

concluded that the trial court's instruction concerning the $5,000 minimum jurisdictional amount under Section 2314 was erroneous (Pet. App. A12-A14).[1] The court of appeals rejected petitioner's other claims, including his contention that the trial court erred in instructing the jury that it was not required to find knowledge or reasonable foreseeability by petitioner of the interstate transportation of the checks he obtained by fraud (*id.* at A5-A7).

Petitioner here renews his contention that knowledge or reasonable foreseeability of interstate transportation of a security obtained by fraud is required under Section 2314. Pet. 10-17. Whatever the merits of petitioner's contention, they are not now ripe for review by this Court.[2] The court of appeals has reversed petitioner's conviction on other grounds. Petitioner is now subject to a retrial and is therefore in substantially the same position as any other defendant facing trial. While the trial court presumably will give those instructions approved by the court of appeals at retrial, the absence of the instruction rejected by the court below might result in a different verdict. If petitioner is acquitted on the merits following retrial, his present contention will be moot. If, on the other hand, petitioner is again convicted and his conviction is affirmed on appeal, he will then be able to present his contention to this Court, together with any other claims he may have, in a petition for a writ of certiorari seeking review of a final judgment of conviction. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.[3]

---

[1]The court of appeals' opinion replaced an earlier opinion rendered by the same panel (Pet. App. B1-B13).

[2]It is now more than 26 months since the return of the indictment. Further review at this time would result in additional delay in the retrial of the charges against petitioner.

[3]Because this case is interlocutory, we are not responding on the merits to the question presented by the petition. We will file a response on the merits if the Court requests.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

APRIL 1985